Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS
CLERK

No. 82-156

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, and ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, and MANUAL FLORES, JR.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

GERALD P. LOPEZ
UCLA School of Law

405 Hilgard Avenue
Los Angeles, CA 90024
(213) 825-1746

Attorney for Respondents

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed a District Court's award of attorney's fees as reasonable under 42 U.S.C. § 1988 where the record contained substantial evidence that the District Court considered, applied and made findings concerning those factors called into question by the complexities of the litigation and necessary to support the reasonableness of the fee award.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	15
Reasons for Denying the Writ	15
I. The Ninth Circuit's Decision Does Not Conflict With The Decisions Of Other Circuits.	15
CONCLUSION	27
APPENDIX A	
EXCERPT FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS, MONDAY, JANUARY 19, 1981	A-1
APPENDIX B	
EXCERPT FROM REPORTER'S TRANSCRIPT, MONDAY, JANUARY 19, 1981	B-1
APPENDIX C	
EXCERPTS FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS, MONDAY, JANUARY 19, 1981	C-1

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Morris
658 F.2d 246
(4th Cir. 1981) 20

Battle v. Anderson
614 F.2d 251
(10th Cir. 1980) 22

City of Detroit v. Grinnell Corp.
495 F.2d 448
(2d Cir. 1974) 16

City of Detroit v. Grinnell Corp.
560 F.2d 1093
(2d Cir. 1977) 16

Cleverly v. Western Electric Co.
594 F.2d 638
(8th Cir. 1979) 22

Copeland v. Marshall
594 F.2d 244
(D.C. Cir. 1978), 15

Copeland v. Marshall
641 F.2d 880
(D.C. Cir. 1980) (en banc), overruling, 594 F.2d 244 (D.C. Cir. 1978) 18

	Page
Copper Liquor, Inc. v. Adolph Coors Co. 624 F.2d 575 (5th Cir. 1981)	19
Fitzpatrick v. Internal Revenue Service 655 F.2d 327 (11th Cir. 1982)	20
Francia v. White 594 F.2d 778 (10th Cir. 1979)	22, 23
Furtado v. Bishop 604 F.2d 80 (1st Cir. 1979)	17, 18
Furtado v. Bishop 635 F.2d 915 (1st Cir. 1980)	18
Hampton v. Hanrahan 500 F.2d 600 (7th Cir. 1979)	23
Hanrahan v. Hampton 446 U.S. 754 (1980)	23
Herrera v. Valentine 653 F.2d 1220 (8th Cir. 1981)	22, 23
Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974)	14, 15 17-19, 21-24

Page

Kamberos v. GTE Automatic Electric, Inc.
603 F.2d 598
(7th Cir. 1979) 22

Kerr v. Screen Extras Guild, Inc.
526 F.2d 67
(9th Cir. 1974),
cert. denied sub nom.
Perkins v. Screen Extras Guild, Inc., 425 U.S. 951
(1976) 13, 14

Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.
487 F.2d 161
(3rd Cir. 1973) 16

Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.
540 F.2d 102
(3rd Cir.1976)
(en banc) 16, 25

Matter of First Colonial Corp. of America
544 F.2d 1291
(5th Cir. 1977), cert.
denied, 431 U.S. 904 19

Monell v. Department of Social Services
436 U.S. 658 (1978) 5, 10

Page

Muscare v. Quinn
614 F.2d 577
(7th Cir. 1980) 22

Northcross v. Board of Education
of the Memphis City Schools
611 F.2d 624
(6th Cir. 1979), cert.
denied, 447 U.S. 911 (1980) 20

Prate v. Freedman
583 F.2d 42
(2d Cir. 1978) 16

Rivera v. City of Riverside
679 F.2d 795
(9th Cir. 1982) 2

Stanford Daily v. Zurcher
64 F.R.D. 680
(N.D. Cal. 1974), aff'd
550 F.2d 464 (9th Cir.),
rev'd on other grounds,
436 U.S. 547 (1978) 23, 24

Statutes

42 U.S.C. § 1981 5, 6

42 U.S.C. § 1983 5, 6, 10

42 U.S.C. § 1985 5

42 U.S.C. § 1985(3) 6

42 U.S.C. § 1986 5, 6

42 U.S.C. § 1988 i, 6, 13, 26

Page

Texts

Eisenberg, Civil Rights Legislation 201, (1981) 5

89 Harv. L. Rev. 922, 934-34 (1976) 5

Constitution

United States Constitution:

Amendment 1 6

Amendment 4 6

Amendment 5 6

Amendment 14 5, 6

Miscellaneous

S.Rep. No. 94-1011, 94th Cong. 2d Sess., 6 (1976) 24

No. 82-156

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF RIVERSIDE, LINFORD L. RICHARDSON, MICHAEL S. WATTS, DAN PETERS, GERALD MILLER, and ROBERT PLAIT,

Petitioners,

vs.

SANTOS RIVERA, JENNIE RIVERA, DONALD RIVERA, JEROME RIVERA, LEE ROY RIVERA, MARK LARABEE, ENRIQUE FLORES, and MANUAL FLORES, JR.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The plaintiffs are all Chicanos and live in the City of Riverside. In August 1975 they were in attendance at a

party given at the home of Santos, Jennie and (their son) Donald Rivera for their nephew Lee Roy Rivera. A large number of unidentified police officers of the City of Riverside, "without a warrant, but with tear-gas and unnecessary physical force," (Pet. App. 1 at 1-3) [1] broke up the party and arrested many of the people attending including four of the plaintiffs. Criminal prosecutions were tenaciously pursued, but the "charges were dismissed for lack of probable cause." (Pet. App. 1 at 1-3.) [2]

---

[1] Citations in this form refer to the appendix to the petition. The opinion of the Ninth Circuit is, contrary to the suggestion of the petition (Pet. at 2), reported. See **Rivera v. City of Riverside**, 679 F.2d 795, 796 (9th Cir. 1982).

[2] Testimony introduced by plaintiffs at trial, which led to judgments (continued)

Despite investigative efforts by plaintiff's counsel that began in late August 1975 (Pet. App. 5 at 5-71; Pet. App. 8 at 8-2), the details of the break-in, arrests and subsequent activity of the police officers and other city officials were -- as of the time of the filing of the civil complaint in this case -- sketchy, confused and almost exclusively within the knowledge of the defendants and other officials of the City of Riverside. Which of the tens of police officers involved did exactly what (both at the Rivera home and later) with whom and to whom was

---

for constitutional deprivations against both the City of Riverside and the individual police officers (Pet. App. 3), included evidence of seriously misstated facts in police reports that served as fabricated probable cause for the break-in, the arrests and the criminal prosecutions.

unknown and unlearnable. [3] Under these circumstances, plaintiffs sued thirty-two defendants, including the City of Riverside and individual police officers [4] alleging civil rights and pendent state tort violations. [5]

---

[3] The factual uncertainties and complexities that confronted plaintiffs throughout this case are perhaps best captured by the District Court's observations to defendants' counsel at a hearing on plaintiffs' motion for attorneys fees after the nine day trial and the jury's verdicts:

THE COURT: Well, I think even up to the point of the trial -- and I will just say this for the record -- even up to and including the time the testimony was taken at trial, what each of those officers did wasn't even clear from what they said themselves. (See Appendix A.)

[4] Research of "John Doe" practice in the Ninth Circuit led, in part, to naming this number of police officers in the original complaint. (Pet. App. 8 at 806.) The Ninth Circuit notes this practical difficulty in footnote 2 of its opinion. (Pet. App. 1 at 1-14.)

[5] Defendants assert throughout (continued)

From the outset, plaintiffs' efforts

their petition that plaintiffs brought 22 claims against each and every defendant. (See, e.g., Pet. at 9.) The original complaint stated seven causes of action (as therein labeled). (Pages 1-15 of Excerpts of Record of Appellants' Opening Brief in the Ninth Circuit.) Claims against the individual officers were alleged on the bases of 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and for false imprisonment, malicious prosecution and negligence. Since in 1976 municipalities could not be sued under Section 1983 (a point explicitly noted in footnote 6 of the Ninth Circuit's opinion (Pet. App. 1 at 1-17)), the claim for constitutional violations against the City of Riverside sounded directly in the Fourteenth Amendment -- a claim that was sometimes referred to in those pre-Monell days (**Monell v. Department of Social Services**, 436 U.S. 658 (1978)) as a "Bivens-type" action. See Eisenberg, **Civil Rights Legislation** 201 (1981); 89 Harv. L. Rev. 922, 934-34 (1976).

While what is labeled in the complaint as Seven Causes of Action might well be interpreted to be something more than seven claims, defendants' final total of 22 seems disingenuous. How did the defendants arrive at the number 22? If one examines pages 7 and 8 of the petition it appears that defendants, in their rush to arrive at an "impressive" number of total claims originally (continued)

to vindicate their civil rights through this lawsuit were not well-received and were the target of considerable criticism and pressure. (The Ninth Circuit described plaintiffs' efforts as "politically unpopular" Pet. App. 1 at 1-2 - 1-3.) The District Court found that many attorneys in the Riverside community "would have been reluctant to

---

brought by the plaintiffs, simply added together all the claims and other items that they themselves had listed there and labeled the final figure, misleadingly, claims. What they had listed on pages 7 and 8 may be catalogued as follows: 1. Constitutional Amendments (First, Fourth, Fifth and Fourteenth Amendments); 2. Statutory Causes of Action (42 U.S.C. §§ 1981, 1983, 1985(3) and 1986); 3. Statutory "Choice of Law" and Attorney's Fees Provisions (42 U.S.C. § 1988); 4. State tort claims (false arrest, malicious prosecution, negligence and others); 5. items of compensatory and punitive damages (bodily injury, property damage, lost wages); and 6. prayers for relief (declaratory and injunctive relief) and attorneys fees.

institute this action" (Pet. App. 2 at 2-2). [6] Any reluctance on the part of attorneys to represent plaintiffs in this action would seem, in retrospect, to have been well-founded. Such was the outrage in Riverside over these plaintiffs trying to vindicate their civil rights that, for example, those police officers dismissed from the suit on motions for summary judgment (Pet. App. 4) shortly thereafter filed in the

---

[6] Defendants assert in their petition, without citation or support, "that there was absolutely no support for such a finding any place in the record" (Pet. at 15). But, in addition to the evidence produced at trial, counsel for plaintiffs expressly addressed themselves to this issue in affidavits in support of the motion for attorneys fees. (Pet. App. 5 at 5-63 - 5-64.) It is true, however, that defendants offered no evidence to dispute this fact; if anything, defendants offered (albeit unintentionally) indirect support for the district court's finding. (See, e.g., Pet. App. 6 at 6-90.)

Riverside Superior Court a malicious prosecution complaint naming both plaintiffs and their counsel as defendants. 7/ Found to raise a disguised federal constitutaional claim (whether under the circumstances the federal civil rights claims were brought in good faith by plaintiffs and their counsel), the state court suit was successfully removed to federal court and dismissed (Pet. App. 5 at 5-44 - 5-45). Because

---

7/ The complaint (**Albee et al v. Rivera et al.**, Case No. 124614) was filed on April 10, 1978, three months after defendants were granted their motion for summary judgment. (Pet. App. 4 at 4-12.)

of the procedural nature of the dismissal, [8] the threat of a renewed suit remains alive to this day. [9]

After four years of discovery and two settlement conferences, [10] a nine day

---

[8] After the district court denied defendants' motion to remand the suit to the Superior Court and dismissed their complaint (See **Albee v. Santos Rivera**, No. 78-2076), defendants appealed the judgment to the Ninth Circuit. (See **Albee v. Rivera**, No 78-3319). The appeal was resolved by stipulation to the effect that the District Court, having accepted jurisdiction, ruled the suit prematurely brought. See Appendix B.

[9] Defendants only mention of this entire episode is an allusion to "work performed [by plaintiffs' counsel] defending an ancillary case and appeal" buried in a passage generally denigrating the District Court's judgment. (Pet. at 52.) Defendants' suggestion that the reasonableness of the time expended on these matters had not been raised explicitly by plaintiffs and considered by the District Court is false. (Pet. App. 5 at 5-44 - 5-45; Appendix B.)

[10] Both settlement conferences (continued)

trial ensued. The jury, following seven days of deliberation, found in favor of all plaintiffs and against the City of Riverside and five [11] individual officers on Section 1983, [12] negligence, false arrest and false imprisonment

---

were ordered by and took place in the presence of the District Court. The final offer made by defendants, after being urged by the District Court to reconsider their substantial exposure at trial, was $10,000 in satisfaction of all plaintiffs' claims, attorneys' fees and costs. (Pet. App. 5 at 5-50 - 5-51.) At the time of plaintiffs' motion for attorneys fees, defendants offered no evidence to dispute this fact.

[11] While the Ninth Circuit opinion states that the jury found against four officers (Pet. App. at 1-4), the correct number is 5 (Pet. App. 3 at 3-1 - 3-13).

[12] The successful Section 1983 claims against the City of Riverside were tried according to the by then decided standards of **Monell v. Department of Social Services**, 436 U.S. 658 (1978).

claims. The jury awarded total damages of $33,350. 13/

On December 1, 1980, plaintiffs moved for reasonable attorneys fees and costs pursuant to Section 1988. (Pet. App. 5.) Defendants filed extensive written opposition and oral argument was heard on January 19, 1981. (Pet. App. 2 at 2-

---

13/ The defendants declare in their petition that no restraining order was issued. (Pet. at 10.) Prominently omitted from the petition is any report of why and under what circumstances injunctive relief did not issue. At the hearing on plaintiffs' motion for attorneys' fees and in the face of defendants' efforts to reduce the fees because injunctive relief had not been granted (an argument reiterated in the present petition (Pet. at 47)), plaintiffs advised the District Court that they had not sought such relief because they perceived enjoining defendants to "obey the law" to be too broad. The District Court nonetheless observed, sua sponte, that "if you [plaintiffs] had asked for it against some of those officers I think I would have granted it." See Appendix C.

1.) Nearly three months later the District Court, "having heard and considered oral argument and having examined and considered the memoranda, affidavits and exhibits filed by the parties," (Pet. App. 2 at 2-1 - 2-2) [14] awarded plaintiffs $245,456.25 in attorney's fees (Pet. App. 2 at 2-4) [15] on

---

[14] Notwithstanding this express statement by the district court, the defendants insist throughout this petition, in diverse form and tone, that the district court did not consider their factual and legal contentions. Perhaps the most egregious example of this misrepresentation is to be found at page 17 of the petition. (Other examples may be found at Pet. at 23, 29, 31-33, 34, 46.) The defendants made the same statements in their briefs to the Ninth Circuit. See Appellees' Brief. That court rejected defendants "version" of the facts, of the record and of what the district court took into account in making its Findings of Fact and Conclusions of Law.

[15] The total figure includes $2,112.50 in law clerk fees. (Pet. App. 2 at 2-4.)

the basis of written Findings of Fact and Conclusions of Law entered on April 7, 1981. (Pet. App. 2 at 2-1.) In so doing, the district court reduced plaintiffs' original request by the amount of costs not contemplated by Section 1988 (Pet. App. 2 at 2-6) and did not apply the multiplier requested by plaintiffs. (Pet. App. 5 at 5-17 - 5-26.)

The Ninth Circuit affirmed the District Court's award as reasonable under Section 1988. (Pet. App. 1.) [16/] The Court of Appeals reviewed the record in detail and concluded that the district court "considered, applied and discussed the **Kerr** factors necessary to support

---

16/ Defendants did not appeal the adverse jury verdicts or the district court's determination that the plaintiffs were the "prevailing party" and thus entitled to attorneys fees. (Pet. App. 1 at 1-4.)

the award." (Pet. App. 1 at 1-6.) [17] Rejecting defendants' argument that all twelve factors must be mechanically invoked and discussed, the Ninth Circuit reiterated that the District Court must consider those factors "called in to question by the case at hand and necessary to support the reasonableness of the fee award." (Pet. App. 1 at 1-6.) [18]

---

[17] In **Kerr v. Screen Extras Guild, Inc.**, 526 F.2d 67, 69 (9th Cir. 1974), cert. denied sub nom. **Perkins v. Screen Extras Guild, Inc.**, 425 U.S. 951 (1976), the Ninth Circuit adopted the twelve factors first established as relevant to an award of attorneys fees in **Johnson v. Georgia Highway Express, Inc.**, 488 F.2d 714, 719 (5th Cir. 1974).

[18] Defendants misleadingly report that the Ninth Circuit held that the District Court need not specifically discuss "any or all of the twelve factors" (Pet. at 19).

ARGUMENT

Reasons for Denying the Writ

I. The Ninth Circuit's Decision Does Not Conflict With The Decisions Of Other Circuits.

The conflicts asserted by petitioners do not exist. In quoting extensively from **Copeland v. Marshall**, 594 F.2d 244 (D.C. Cir. 1978) as an illustration of how other circuits "correctly" employ the factors first identified in **Johnson v. Georgia Highway Express, Inc.**, 488 F.2d 714, 719 (5th Cir. 1974), defendants have relied on an opinion which the District of Columbia Circuit has overruled. **Copeland v. Marshall**, 641 F.2d 880 (D.C. Cir. 1980) (en banc), overruling 594 F.2d 244 (D.C. Cir. 1978). The en banc Court of Appeals rejected the earlier panel's application of the **Johnson** factors and, in its

place, adopted the "lodestar" or "market value" method of fee setting. 641 F.2d at 896. First espoused by the Third Circuit in **Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.**, 487 F.2d 161 (3rd Cir. 1973), and its successor **Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.**, 540 F.2d 102 (3rd Cir. 1976) (en banc) and shortly thereafter adopted by the Second Circuit in **City of Detroit v. Grinnell Corp.**, 495 F.2d 448 (2d Cir. 1974), [19] the lodestar approach typically requires the District Court to

---

[19] The citation of **Prate v. Freedman**, 583 F.2d 42, 48 (2d Cir. 1978) in the petition (Pet. at 24 footnote 1) is misleading insofar as it is not accompanied by citation to a case that makes clear that since 1974 the Second Circuit has espoused the lodestar approach. See e.g., **City of Detroit v. Grinnell Corp.**, 560 F.2d 1093, 1098 (2d Cir. 1977).

determine the lodestar by multiplying the number of hours reasonably expended by a reasonable hourly rate. 641 F.2d at 891. The District Court may then adjust the lodestar figure upward or downward to take account of factors such as risk and complexity of the litigation and the quality of the representation. 641 F.2d at 892-894. While **Johnson** factors remain relevant in such a scheme, they may well be incorporated into an analytical framework and each of the twelve factors need not be identified or discussed separately by the District Court. 641 F.2d at 889-890. 20/

Similarly, in citing without comment **Furtado v. Bishop**, 604 F.2d 80, 98 (1st

---

20/ The District of Columbia Circuit Court observed that the twelve factors frequently overlap and are often imprecise. 641 F.2d at 890.

Cir. 1979) (Pet. at 24 footnote 1), defendants have relied on an opinion which the First Circuit displaced with its later opinion **Furtado v. Bishop**, 635 F.2d 915 (1st Cir. 1980). Lauding the Third Circuit's lodestar approach as "the most helpful to date" and borrowing extensively from the District of Columbia's en banc **Copeland** decision, the First Circuit joined these other circuits in shaping a market value method of fee setting which allows but does not require the discussion of all **Johnson** factors. 635 F.2d at 919-920.

Moreover, in citing only **Johnson v. Georgia Highway Express**, 488 F.2d 714 (5th Cir. 1974) (Pet. at 24), defendants have relied on an opinion which, standing alone, no longer reflects the state of the law in the Fifth Circuit. With

its decision in **Matter of First Colonial Corp. of America**, 544 F.2d 1291 (5th Cir. 1977), cert. denied, 431 U.S. 904, the "Johnson test," to use the Fifth Circuit's own language, now "is similar to the Third Circuit's 'lodestar' method of computing attorneys' fees." **Copper Liquor, Inc. v. Adolph Coors, Co.**, 624 F.2d 575, n. 15 at 483 (5th Cir. 1981). While requiring that the **Johnson** factors be considered, the Fifth Circuit has now expressly disavowed the use of these factors as a "laundry list", 624 F.2d at 584, and, like the other "lodestar" circuits, the Fifth Circuit has begun to incorporate the factors into an analytical framework where both the lodestar and adjustments are determined on the basis of those factors significant in view of the particular case. 624 F.2d

at 583. Both the Fourth Circuit and the Eleventh Circuit have adopted the Fifth Circuit's new lodestar-like methodology in opinions which defendants cites in the petition as supporting the Fifth Circuit's old and now rejected view. See **Anderson v. Morris**, 658 F.2d 246, 249 (4th Cir. 1981); **Fitzpatrick v. Internal Revenue Service**, 655 F.2d 327, 332-333 (11th Cir. 1982). (Pet. at 24 footnote 1.)

The lodestar and lodestar-like methods for awarding attorneys fees bear a strong resemblance to the Sixth Circuit approach cited approvingly in the Ninth Circuit opinion. (Pet. App. 1 at 1-9 - 1-10). In **Northcross v. Board of Education of the Memphis City Schools**, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980), the Sixth Circuit

observed, after listing and noting its earlier mechanical reliance on the twelve **Johnson** factors, that it had "learned through experience . . . that merely providing a checklist of factors to consider does not lead to consistent results, or, in many cases, reasonable fees." 611 F.2d at 642. Noting that the factors overlap and may not apply in each given case, the Sixth Circuit went on to adopt an analytical approach predicated on the number of hours reasonably expended-times-reasonable hourly rate and flexible enough to accommodate increases in billing rate based on risk, complexity and quality. 611 F.2d at 642. Like lodestar circuits and the Ninth Circuit, the Sixth Circuit concluded that a District Court need not discuss specifically each of the twelve

factors so long as the record reflects that those factors relevant to the case at hand were considered in arriving at a reasonable award. 611 F.2d at 643. [21] And, contrary to the assertions and citations in the petition, this flexible use of the **Johnson** factors is consistent with decisions in the Seventh, Eighth and Tenth Circuits. See **Muscare v. Quinn**, 614 F.2d 577, 579 (7th Cir. 1980); **Kamberos v. GTE Automatic Electric, Inc.**, 603 F.2d 598 (7th Cir. 1979); **Herrera v. Valentine**, 653 F.2d 1220, 1233 (8th Cir. 1981); **Cleverly v.**

---

[21] The only Sixth Circuit opinion relied on by defendants allegedly supporting defendants is **Northcross**. (Pet. at 51-52.) No Sixth Circuit opinion is cited in footnote 1 where the decisions from the other circuits allegedly supporting defendants' assertion of conflict are listed. (Pet. at 24 footnote 1.)

Western Electric Co., 594 F.2d 638 (8th Cir. 1979); **Battle v. Anderson**, 614 F.2d 251, 258 (10th Cir. 1980); **Francia v. White**, 594 F.2d 778, 782 (10th Cir. 1979). 22/

That the Ninth Circuit opinion in this case is consonant with the decisions of other circuits is not surprising. In following its own early decision in **Stanford Daily v. Zurcher**, 64 F.R.D. 680, 682 (N.D. Cal. 1974), aff'd

---

22/ In citing **Herrera** and **Francia** (Pet. at 24 footnote 1), defendants rely on cases in which the Eighth and Tenth Circuit, respectively, espouse views consistent with those of the Ninth Circuit and inconsistent with the assertion of conflict made by the defendants. **Hampton v. Hanrahan**, 500 F.2d 600, 643 (7th Cir. 1979), though it was later reversed in part in **Hanrahan v. Hampton**, 446 U.S. 754 (1980), is only inaccurate in that it is an incomplete representation of the Seventh Circuit's view of the **Johnson** factors. (Pet. at 24 footnote 1.)

550 F.2d 464 (9th Cir.), rev'd on other grounds, 436 U.S. 547 (1978) (Pet. App. 1 at 1-6 - 1-7), the Ninth Circuit relied on a case that was cited explicitly in the legislative history of Section 1988 as correctly applying the **Johnson** factors. 23/ Having noted that

---

23/ What follows is the relevant excerpt from the Senate Report:

"It is intended that the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see **Johnson v. Georgia Highway Express**, 488 F.2d 714 (5th Cir. 1974) are correctly applied in such cases as **Stanford Daily v. Zurcher**, 64 F.R.D. 680 (N.D. Cal. 1974); **Davis v. County of Los Angeles**, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and **Swann v. Charlotte-Mecklenburg Board of Education**, 66 F.R.D. 483 (W.D.N.C. 1974.)"

S. Rep. No. 94-1011, 94th Cong. 2d Sess., 6 (1976).

the Fifth Circuit offered no guidance on how to use these factors, the district court in **Stanford Daily** modeled its use of the factors after the Third Circuit's lodestar method adopted in **Lindy**. 64 F.R.D. at 682. Moreover, the Ninth and other Circuits' flexible application of these factors is not only consistent with legislative history but is also sensible. Since District Courts are in the best position to scrutinize closely the complexities of the litigation and the quality of the representation, they must be given guidance yet be allowed the flexibility to make a determination of the proper fee award. Who better than a District Court to judge, for example, that other attorneys in the community would be reluctant to represent civil rights plaintiffs (Pet. App.

at 2-2) or that time spent pursuing claims against ultimately dismissed defendants was reasonable and reflected sound legal judgment in view of peculiarly difficult factual and legal circumstances surrounding a case? (See Pet. App. 2 at 2-4 - 2-5 and Appendix A). The Ninth Circuit responsibly reviewed the careful work of a district court which followed an approach consonant with the approaches of all other circuits in awarding attorney's fees under Section 1988. This Court should not grant the petition in this case on the basis of an asserted conflict that does not exist.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD P. LOPEZ

Attorney for Respondents

APPENDIX A

EXCERPT FROM REPORTER'S TRANSCRIPT
OF PROCEEDINGS MONDAY,
JANUARY 19, 1981:

THE COURT: Let me ask you something, Mr. Kotler.

Suppose, just suppose that you had been involved in that situation and you had been one of the people who was arrested and taken in. And consider all the circumstances that occurred. Would you have known what participation there was of each one of the officers?

MR. KOTLER: I think, your Honor, when almost a year passes between the time I was arrested and taken in and the suit is filed, a year in which discovery could have been taken, and then people who are sued who weren't even on duty that night, weren't even there, weren't on duty, had nothing to do with it, I think I would know that.

THE COURT: How did they know? I mean, you have got a situation there where you have got teargas and people being herded out into the street. I don't think under those circumstances that the people who were in and around the house had much of an opportunity to take down the badge numbers of those officers.

MR. KOTLER: I think it is clear that the people who were arrested that night did not. I think it is equally clear that the attorneys who filed the lawsuit did.

THE COURT: Well, I think even up to the point of the trial -- and I will just say this for the record -- even up to and including the time the testimony was taken at the trial, what each of

those officers did wasn't even clear from what they said themselves.

MR. KOTLER: I think that is so, your Honor, but you have to remember that at that point, at the time of the trial, 18 police officers had been let out by Judge Ferguson in this case because it was found by him that they had absolutely nothing to do with what happened.

THE COURT: I don't see how, I really absolutely don't see how, aside from taking the deposition of 50 officers, in which event there would have been objection and all kinds of motions made, I don't see how they would have known who it was who did what. Under the circumstances, I don't see how.

APPENDIX B

EXCERPT FROM REPORTER'S TRANSCRIPT
MONDAY, JANUARY 19, 1981:

MR. LOPEZ: The history of this case that was filed in the State Court in the County of Riverside is, I think, accurately described as "peculiar".

After it was dismissed by Judge Ferguson there was a disagreement between Mr. Kotler and Judge Ferguson, one that frankly we were on the outside of, as to whether or not it should be dismissed with or without prejudice.

In fairness to Mr. Kotler and the defendants, what Judge Ferguson intended was an order dismissing it with prejudice because he thought at that time that in order to comply with some federal version of a malicious prosecution claim there had to be a final order from which the defendants could move, and

that a summary judgment in the context of a larger case was not a final order.

Mr. Kotler disagreed, claiming that if you dismiss it with prejudice, even with that meaning, that they shall -- that is, the 18 summarily adjudged defendants -- be forever foreclosed from bringing this claim again.

Mr. Kotler took it up on appeal, where he and Cazares argued before the Ninth Circuit. The Ninth Circuit essentially said, "What is it that you want?"

And Mr. Kotler said, "Simply not to be foreclosed in the future."

Both our papers and Mr. Cazares in oral argument said, "We understand that that is not the case and we don't mean to misconstrue what Judge Ferguson always had intended to do," in which case

the order of the Ninth Circuit was handed down consistent with that.

What remains, however, it not only the possibility but I suspect the likelihood, that both our clients and Mr. Cazares and myself will again be sued in the Riverside Court on the basis of this malicious prosecution that we had already once successfully removed. So that I strongly suspect that we will be before this Court again on a case intimately related to the case that was tried before this jury, and go forward on that.

And that is all that remains.

THE COURT: I suppose that, if that is the kind of judgment which is being exercised, that is the kind of judgment that is being exercised, and it will come to me.

MR. LOPEZ: Thank you, your Honor.

APPENDIX C

EXCERPTS FROM REPORTER'S TRANSCRIPT
OF PROCEEDINGS MONDAY,
JANUARY 19, 1981:

THE COURT: * * *

The question of injunctive relief actually was something I wasn't going to address before the Court and I can tell you quite simply why not. While it was clearly not a question brought to the jury, since the jury has nothing to do with granting equitable relief.

THE COURT: Nothing, no.

MR. LOPEZ: -- we thought hard and long about precisely what entitlements we had for any of our plaintiffs with respect to some kind of future equitable relief.

But the bottom line of what we would ask for is virtually always denied by a court because a court properly, I think, says that for the future we will assume

that all police officers will abide by the law, including the Constitution.

So that we brought nothing and have pursued nothing; indeed because we too agree with the Court that that will happen.

THE COURT: Now let me just say one thing for the record, and that is: That the plea was in there for injunctive relief. There wasn't any reason to pursue it, I suppose. But if you had asked for it against some of those officers I think I would have granted it.

MR. LOPEZ: I hope I can accept that as a proposition that says that in the event that anything happens in the future concerning those officers or our clients in the City of Riverside, that this Court will remain available for any appropriate equitable relief.

THE COURT: I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was -- it would have warranted an injunction. There cannot be a piece of evidence more appalling than the piece of evidence about the officer singing from the helicopter. There can't be any behavior more reprehensible than that, in my opinion.

Now I will not comment on some of the rest of it because part of the rest of the behavior at the time that this occurred was due to the fact that they didn't know what they were doing and they had nobody to tell them what they should do. There was no direction and they just simply lost their heads,

totally. That is my opinion from the evidence.

I will not go on to castigate the officers, but in my opinion this was really a very sad day for that police department.